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Presented below is the eighth annual Survey of Washington Case Law. The articles in this survey issue have been written by second-year students as a part of their program to attain status as nominees to the *Law Review*. The second-year students were guided in their work by the Casenote Survey Editor of the *Law Review* and by various members of the law school faculty.

The case survey issue does not represent an attempt to discuss every Washington case decided in 1960. Rather, its purpose is to point out those cases which, in the opinion of the Editorial Board, constitute substantial additions to the body of law in Washington.

ATTORNEY-CLIENT

Admissibility of Conscientious Objectors to the Bar. The Washington Supreme Court considered a conscientious objector's moral fitness to practice law for the first time in *In re Brooks*.[1] The court held that the absence of *any* sense of duty to protect his heritage of liberty renders an applicant for admission to the bar morally unfit.

Robert Boland Brooks registered with his local Selective Service Board during World War II. He was awarded the status of conscientious objector under the terms of the Selective Training and Service Act of 1940.[2] Thereafter he was ordered to report to a civilian labor camp to do work of national importance in lieu of performing military service. He refused to report for civilian duty and notified his local

[1] 156 Wash. Dec. 773, 355 P.2d 840 (1960).
[2] Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 889 (now Selective Service Act of 1948, ch. 625, § 6(j), as amended, 62 Stat. 612, 50 U.S.C. App. 456(j) (1952).

Selective Service Board to that effect. Persistence in refusal to report led to trial and conviction[3] of a felony.[4] A sentence of three years in federal prison was imposed. Twenty-two months of the sentence were served.

Subsequently Brooks applied to take the Washington Bar Examination. The Board of Governors found that he was qualified to take the examination with respect to age, education and residence. The application was denied, however, because the Board of Governors determined that the applicant was not a man of good moral character. The determination was predicated upon the felony conviction. At the time of his application to take the bar examination, Brooks' position in matters of conscience remained unchanged. He stated that should he be conscripted for any duty in connection with a war effort in the future, his course of conduct would be the same. It was further indicated that he would urge others to adopt his beliefs.

The inherent power to grant or deny admission to the practice of law in Washington lies in the supreme court.[5] The court may establish moral standards which attorneys must meet before being admitted to practice but the standards must have a rational connection with the applicant's fitness for the practice of law.[6] The court's conclusion that an applicant does not possess the requisite good moral character must be based on evidence which rationally justifies such a conclusion.[7]

In its majority opinion the court deemed the applicant's moral character to be intrinsically defective. A claim to individual, constitutionally guaranteed liberties with no corresponding sense of duty to protect their source, made the applicant morally unfit. The court clearly disavowed any purpose to punish the applicant for his past felony conviction. Rather, it was concerned with his present denial of any duty to defend his country. Although Brooks contended that his unwillingness to serve need not disqualify him, since his age of fifty years made it unlikely that he would be conscripted again, the court considered this unimportant. Personal unwillingness to serve was counted as but one way in which the applicant might manifest his felonious principles. The court did not enumerate other ways in which the applicant might manifest his felonious principles but it may be assumed that the

[3] Brooks v. United States, 147 F.2d 134 (2d Cir.), *cert. denied*, 324 U.S. 878 (1945).
[4] Act of Sept. 16, 1940, ch. 720, § 11, 54 Stat. 894 (now Selective Service Act of 1948, ch. 625 § 12(a), 62 Stat. 622, 50 U.S.C. App. § 462(a) (1952).
[5] *In re* Levy, 23 Wn.2d 607, 161 P.2d 651 (1945).
[6] Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).
[7] Konigsberg v. State Bar, 353 U.S. 252 (1957).

advice which he might give to others was foremost in its mind. Members of the legal profession should not advocate violation of the duly constituted law.[8]

In the concurring opinion, the applicant's attitude and past conduct were considered to be immoral because they were unreasonable. By affording him the status of conscientious objector and making provision for noncombatant work in a civilian labor camp, Congress had afforded the applicant a reasonable course of action. His failure to pursue such a reasonable course of action was unreasonable. It was not justifiable. It was morally reprehensible. It was unreasonable because reasonable men do not carry utopian, pacifistic ideals too far in this world of tyrants and bullies who would devour our freedom. The opinion is characterized by a frank acknowledgment that the court is making a personal judgment, without the aid of an objective standard.

The dissenting opinion described the applicant's refusal to sacrifice his conscientious principles for the sake of expediency as a highly moral and admirable trait of character.

The court's arrival at three differently grounded conclusions bears testimony to the difficulties encountered in passing moral judgment on honest and forthright conduct which is based on firm convictions. The case is significant, not for the court's diversity of opinion, but for its willingness to become embroiled in a controversy over morality when the decision might have been bottomed on other grounds.

Prior to being admitted to practice, each applicant must take the Oath of Attorney.[9] The Oath of Attorney contains an undertaking to "support the constitution of the United States and the constitution of the State of Washington."[10] The constitutions of both the United States and the State of Washington contain provisions for military service. The United States Constitution empowers Congress "to raise and support armies."[11] The federal government enjoys the power to raise and maintain armies without regard for the conscientious scruples of individuals.[12] The Washington Constitution provides that, "all able-bodied male citizens of this state between the ages of eighteen (18) and

[8] *In re* Smith, 133 Wash. 145, 233 Pac. 288 (1925). A Washington attorney had advocated violation of the established law in order to effect social reform, at various meetings held under the auspices of the Industrial Workers of the World. In disbarment proceedings he was held to be unworthy of the office of attorney at law.

[9] RCW 2.48.210; Rule 5B, Rules for Admission to Practice, Washington Court Rules (West 1960).

[10] RCW 2.48.210; Rule 5C (2), Rules for Admission to Practice, Washington Court Rules (West 1960).

[11] U.S. CONST. art. I, § 8 (11).

[12] United States v. MacIntosh, 283 U.S. 605 (1931).

forty-five (45) years except such as are exempt by laws of the United States or by the laws of this state, shall be liable to military duty."[13] While the applicant was no longer subject to duty with the Washington militia because of his advanced age, he clearly had denied *any* duty to perform military service. The problem thus could have appeared to be one of his professed inability to take the Oath of Attorney without mental reservation, as well as one of his moral character.

In *In re Summers*[14] an applicant was denied admission to the Illinois State Bar on the ground that he would be unable to take the Oath of Attorney. The oath contained an undertaking to support the constitution of the State of Illinois. The Illinois Constitution provided that the state's militia should consist of all able-bodied, male residents of the state between the ages of eighteen and forty-five years.[15] The applicant Summers' age made him subject to duty with the state militia in the event that it was called to duty in time of war.[16] He had registered with his local Selective Service Board and had been accorded the status of conscientious objector.[17] Admission to practice was denied on the specific ground that should the militia be called to duty in time of war[18] the applicant would admittedly be unwilling to serve. Although the applicant stood ready to take an oath to support the Illinois Constitution, he could not do so without making certain mental reservations.

On certiorari[19] the United States Supreme Court held that the Illinois interpretation of the oath, which required a willingness to serve in the state militia, did not violate the applicant's first amendment right to freedom of religion. The Court reached its conclusion by drawing an analogy to cases in which applicants had been denied admission to citizenship because they could not promise to bear arms in the military.[20] It concluded that if a promise to bear arms may be made a prerequisite to admission to citizenship, then a state may also exact such a promise from those charged with the administration of its laws.

Since the applicant in the *Brooks* case was fifty years old, his liabil-

[13] WASH. CONST. art. X, § 1.

[14] 325 U.S. 561 (1944). In Illinois, admission to practice was considered to be a ministerial rather than a judicial function of the Illinois Supreme Court. Consequently the case does not appear in the Illinois Reports.

[15] ILL. CONST. art. XII, § 1.

[16] The Illinois Constitution, art. XII, § 6, excused those with conscientious scruples against bearing arms from duty with the militia except in time of war.

[17] Note 2 *supra.*

[18] Note 15 *supra.*

[19] 325 U.S. 561 (1944).

[20] United States v. Bland, 283 U.S. 636 (1931); United States v. MacIntosh, 283 U.S. 605 (1931); United States v. Schwimmer, 279 U.S. 644 (1929).

ity to service in the state militia was no longer in question. It had ended with his forty-sixth birthday anniversary.[21] Thus the case does not fall squarely within the rather narrow confines of the *Summers* case.

In Washington the Oath of Attorney embraces more than obedience to the state constitution. It includes an undertaking to support the Constitution of the United States. The United States Constitution places no age limitation on those liable for military service. Congress could require military service from men of the applicant's age and remain within the bounds of constitutional propriety. Denial of Brooks' application might have been based upon his professed inability to obey the United States Constitution in the event that he should be called upon to serve in the United States Army. The eventuality that Brooks might be called upon to serve in the United States Army is no more remote than the possibility that Summers would have been called to duty with the Illinois State Militia.[22] Surely the United States Supreme Court would accord the same deference to its own interpretation of the United States Constitution,[23] if adopted by the Washington Supreme Court, as it paid to the Illinois Supreme Court's interpretation of the Illinois Constitution in the *Summers* case.

To support the constitutions of the United States and of Washington comprehends more than to obey them if called upon to do so. To support means, "to vindicate, to maintain, to defend, to uphold with aid or countenance."[24] The word in its context seems to connote an attitude and ancillary action in support of the respective constitutions as well as direct action in their behalf or at their call. Considering Brooks' defiant attitude toward any service in connection with a war effort and his expressed intent to solicit adherents to his point of view, the court could have refused his application on the ground that he could not take

[21] The Washington Constitution, art. X, § 1, made only those between the ages of eighteen and forty-five subject to duty with the militia.

[22] Summers applied for admission to the bar in 1944. The Illinois State Militia had not been called to active duty since 1864. The Illinois Constitution, art. XII, § 1, exempted from duty with the militia all persons made exempt by the laws of the United States. The Selective Training and Srvice Act of 1940, note 2 *supra*, gave those with conscientious scruples against bearing arms an opportunity to do civilian work of national importance in lieu of performing military service. The Illinois Constitution, art. XII, § 6, excused those with conscientious scruples against bearing arms from duty with the militia except in time of war. Thus Summers' liability to service with the state militia was contingent upon the militia being called to active duty, the repeal of the Selective Training and Service Act of 1940 and the continuation of World War II past his forty-sixth birthday.

[23] That is, that Congress may constitutionally require military service without regard for individual scruples. United States v. MacIntosh, 283 U.S. 605 (1931).

[24] United States v. Shulze, 253 Fed. 377, 379 (S.D. Cal. 1918).

the Oath of Attorney despite the improbability that he would ever be called to active service.

Had the court chosen to follow the *Summers* case, one less than desirable result might have occurred. To hold the applicant unable to take the Oath of Attorney because of his unwillingness to perform military service would have been to disqualify all conscientious objectors for the practice of law. To disqualify conscientious objectors as a class would necessarily imply disqualification of those willing to do work of national importance in a prescribed civilian capacity.

The applicant in the *Summers* case was excused from performing combatant military service by the Selective Training and Service Act of 1940.[25] The case is silent, however, with respect to Summers' willingness or unwillingness to perform noncombatant or civilian service. The case is authority only for the proposition that one who would not perform combatant service with his state militia may constitutionally be denied admission to the bar on that account. Should the factor of an applicant's willingness to follow a congressionally prescribed course of conduct as a substitute for combatant military service be added to the facts of the *Summers* case, there is reason to believe that the Supreme Court would hold differently.

In *Girouard v. United States,*[26] a naturalization proceeding, the Supreme Court held that an oath to support and defend the Constitution from its enemies, foreign and domestic, does not include a promise to bear arms unless Congress intends that it should. In admitting a conscientious objector, willing to perform noncombatant service, to citizenship, the Court overruled the earlier cases of *United States v. Bland,*[27] *United States v. MacIntosh,*[28] and *United States v. Schwimmer.*[29] Denial of citizenship in the earlier cases was predicated upon the Court's determination that the oath to defend the Constitution, required as a prerequisite to being admitted to citizenship by the Naturalization Act of 1906,[30] effectively precluded anyone unwilling to bear arms from citizenship. Whether or not Congress had intended the

[25] Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 889 (now Selective Service Act of 1948, ch. 625, § 6(j), as amended, 62 Stat. 612, 50 U.S.C. § 456(j) (1952)). The act excused those with religious scruples from bearing arms. The Illinois Constitution, art. XII, § 1, exempted all persons made exempt by the laws of the United States, from duty with the state militia.

[26] 328 U.S. 61 (1946).

[27] 283 U.S. 636 (1931).

[28] 283 U.S. 605 (1931).

[29] 279 U.S. 644 (1929).

[30] Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596 (now Immigration and Nationality Act, ch. 477, § 337, 66 Stat. 258 (1952), 8 U.S.C. § 1448 (1958)).

oath to have that effect was not considered. The earlier cases were decided on the basis of the applicants' inability to take the oath without mental reservation. In the *Girouard* case, the Court was led to believe that in passing the Nationality Act of 1940,[31] Congress intended that the oath should not have the effect of barring conscientious objectors, willing to perform noncombatant service, from citizenship.[32] Effect was given to the congressional intent and the applicant was admitted to citizenship.

In the *Girouard* case the Court's decision was based on Congress' failure to expressly provide that the oath to support and defend the Constitution included a promise to bear arms. From this it may fairly be inferred that the Court would give effect to an express requirement that the applicant for citizenship promise to bear arms. It might further be concluded that the Supreme Court would honor a state supreme court's expressed intent, that in bar admission proceedings an oath to support the Constitution includes a promise to bear arms. There is a basic difference in the status of an alien seeking admission to citizenship and the status of an applicant seeking admission to the bar, however. "Naturalization is a privilege, to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes."[33] "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualifications must have a rational connection with the applicant's fitness or capacity to practice law."[34] In the *Girouard* case the Court pointed out that the, "petitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices."[35] In the face of such a statement it seems doubtful that the Court would hold that an applicant's mere refusal to promise to bear arms makes him unfit for the practice of law.

[31] Nationality Act of 1940, ch. 876, § 335, 54 Stat. 1157 (now Immigration and Nationality Act, ch. 477, § 337, 66 Stat. 258 (1952), 8 U.S.C. § 1448 (1958)).

[32] The Second War Powers Act, ch. 199, §§ 701-05, 56 Stat. 182 (1942), waived certain citizenship prerequisites for persons who served honorably in the military service during World War II. Persons who performed noncombatant military service were admitted to citizenship under the act, although they were required to take an oath substantially identical to that required by the Nationality Act of 1940, cited note 31 *supra*, and the Naturalization Act of 1906, cited note 30 *supra*. From this the Court reasoned that Congress did not intend to require more of those who would be willing to perform noncombatant service in the future than from those who had had an opportunity to serve in the military in the past.

[33] United States v. MacIntosh, 283 U.S. 605, 615 (1931). Girouard v. United States, 328 U.S. 61 (1946), also proceeds on this assumption.

[34] Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

[35] 328 U.S. 61, 65 (1946).

In the *Summers* case the Supreme Court held that the applicant could constitutionally be denied admission to the Illinois Bar. Because of his unwillingness to bear arms in the state militia and his consequent inability to take the Oath of Attorney, he did not possess the degree of good citizenship which a state may make a requisite to membership in its bar. In the *Girouard* case the Court reexamined its criteria of what constitutes good citizenship. Its statement that an individual may fulfill his obligations of citizenship without shouldering a rifle raises doubt as to whether a state may now deny an applicant admission to its bar because of his unwillingness to bear arms in the state militia or the United States Army. The Court's recitation of noncombatant military service and civilian work of national importance as means by which a citizen may discharge his duties of citizenship indicates that a willingness to bear arms is not an essential feature of good citizenship.

It is clear from the *Summers* case that a state may require that the members of its bar be good citizens. While the Court appears to have changed its concept of what constitutes good citizenship in the *Girouard* case, one who has denied every duty to serve his country in time of war could hardly meet even the newly defined standards. Thus the *Summers* case would still probably be authority for denying admission to the applicant in the *Brooks* case, since he had denied any duty to his country in time of war.

From the *Brooks* case it is clear that an applicant who denies any duty to promote a war effort will not be admitted to the bar in Washington. The admissibility of an applicant who refuses to bear arms but who is willing to perform noncombatant service has not been decided. Both the concurring and dissenting opinions in the *Brooks* case express fear that the rather broad majority opinion equates conscientious objection with bad moral character per se.[36] There are factors which militate against such a conclusion, however. One is the very narrow context in which the case came before the court. The applicant had refused to perform military service *and* had been convicted of a felony for his refusal to do civilian work of national importance. Another is the language used in the majority opinion. "On the debit side of the ledger is his felonious denial of *any duty* related to the enjoyment of these individual liberties." (Emphasis added to "any".)[37] The opinion continues, decrying the applicant's failure to sense a duty,

[36] *In re* Brooks, 156 Wash. Dec. 773, 780, 783, 355 P.2d 840, 844, 845 (1960).
[37] *Id.* at 776, 355 P.2d at 842.

without ever designating it a duty to perform military service or to bear arms.

The court based its holding on the applicant's moral duty to share in the preservation of his heritage of liberty, rather than upon his potential constitutional duty to perform military service. By doing so it appears to have postponed to another day the question of the admissibility of conscientious objectors willing to do civilian work of national importance or to perform noncombatant military service.

LEON MISTEREK

CONSTITUTIONAL LAW

Constitutional Right to Counsel. The opinions of the United States Supreme Court[1] have shown basic differences among the members of the Court as to the duty of a court to provide counsel for an accused to meet the constitutional requirements of the sixth[2] or fourteenth[3] amendments. Recent cases decided by the Washington Supreme Court under the state constitution and statutes indicate the same split of philosophy as to the degree of protection necessary. It appears that the Washington court has now adopted a more liberal position which will demand greater care by trial courts in protecting the rights of indigent prisoners. While the position of the United States Supreme Court will be briefly considered,[4] the purpose of this note is to bring

[1] Contrast the opinions of Mr. Justice Black in *In re* Groban, 352 U.S. 330, 344 (1957) (dissent) and Mr. Justice Douglas in Crooker v. California, 357 U.S. 433, 448 (1958) (dissent) with those of Mr. Justice Jackson in Watts v. Indiana, 338 U.S. 49, 58 (1949) (concurring), Harris v. South Carolina, 338 U.S. 68 (1949) (dissent), and Turner v. Pennsylvania, 338 U.S. 62 (1949) (dissent).

[2] "In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense." This applies only to trials in federal courts. Betts v. Brady, 316 U.S. 455 (1942).

[3] "Nor shall any State deprive any person of life, liberty or property without due process of law." This amendment does not incorporate, as such, the specific guarantee of the sixth amendment. Betts v. Brady, *supra* note 2; *In re* Gensburg v. Smith, 35 Wn.2d 849, 215 P.2d 880 (1950).

[4] The standards in determining whether failure of the state court to provide counsel to a defendant at trial and for a reasonable time prior to trial violates due process under the fourteenth amendment, vary in capital and non-capital cases. In capital cases, Powell v. Alabama, 287 U.S. 45 (1932) established the rule that the trial court has an affirmative responsibility to provide counsel to an accused person who does not have one, unless he intelligently waives his legal right to such assistance. See also Bute v. Illinois, 333 U.S. 640 (1948). In non-capital cases, however, the refusal of a state court to appoint counsel for an indigent defendant is not necessarily a denial of due process. Under the fourteenth amendment, states are only required to afford assistance of counsel when there are special circumstances, such as extreme youth, ignorance, or an offense of a particularly complicated nature. MORELAND, MODERN CRIMINAL PROCEDURE, Ch. 12 (1959); Note, 38 KY. L.J. 317, 320 (1950). "In the great majority of the states, it has been the considered judgment of the... courts that appointment of counsel is not a fundamental right, essential to a fair trial." Betts v. Brade, 316 U.S. 455, 471 (1942). In Bute v. Illinois, 333 U.S. 640 (1948) a 57 year old